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FERNRITE SDN BHD

v.

PERBADANAN NASIONAL BHD

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: W-02-1063-2007]

C

30 MARCH 2011

SECURITIES: *Shares - Agreement - Whether defendant held shares on constructive trust for plaintiff - Whether plaintiff could claim equity against defendant in respect of dividends received by defendant - Defendant did not pay purchase price - Whether retention of dividends by defendant amount to unjust enrichment*

D

CONTRACT: *Shares - Agreement - Whether defendant held shares on constructive trust for plaintiff - Whether plaintiff could claim equity against defendant in respect of dividends received by defendant - Defendant did not pay purchase price - Whether retention of dividends by defendant amount to unjust enrichment*

E

The plaintiff, by an agreement dated 19 August 1996 ("the principal agreement"), agreed to sell the shares to the defendant, the full purchase price being RM409,568,312.80 ('the purchase price'). Pursuant to the principal agreement, the defendant provided the plaintiff with an irrevocable bank guarantee for the purchase price. The defendant was required to pay the purchase price to the plaintiff on or before 16 October 1997. The defendant failed to do so. The parties then entered into two supplemental agreements granting extensions to the defendant to pay the purchase price but the defendant still failed to comply. On 22 October 2001, the parties entered into a Settlement Agreement whereby, *inter alia*, (i) the sale and purchase of the shares was terminated; (ii) the defendant re-transferred the shares to the plaintiff and (iii) the monies amounting to more than RM20 million in the Sinking Fund Account (which was opened in the joint names of the defendant and the plaintiff for the purpose of utilising the monies in that account towards the payment of the purchase price and interest) were released to the plaintiff. During the period of some five years from 16 October 1996 to 22 October 2001,

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the shares were registered in the defendant's name, and the company was controlled and managed by the defendant's representatives. The defendant had also received net of tax and the dividends declared for the shares. In the High Court, the judge had allowed the plaintiff's originating summons and declared that 199,301,606 shares ('the shares') in Pernas International Holdings Berhad ('the shares') registered in the name of the defendant and the dividends amounting to RM100,527,735.12 ("the dividends") received by the defendant were held by the defendant as constructive trustee for the plaintiff, to be paid to the plaintiff ('the High Court decision'). The defendant appealed. The issues that arose were (i) whether the defendant was holding the shares on constructive trust for the plaintiff so that the plaintiff had a claim in equity against the defendant in respect of the dividends received by the defendant and (ii) whether the retention of the dividends by the defendant, as purchaser of the shares, without paying the purchase price therefore, amount to unjust enrichment.

Held (dismissing the appeal)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) A constructive trust arises by operation of law. It is imposed by equity by reason of justice and good conscience. It has been described as "a constructive trust of a new model." : per Lord Denning MR in *Eves v. Eves*. This principle was applied in *Sanmaru Overseas Marketing Sdn Bhd & Anor v. PT Indofood Interna Corp & Ors*. By reason of the principles of equity found in *Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd Soo Yuh Mian (Intervener)* and *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, and in accordance with justice and good conscience, there was no doubt that the defendant herein was holding the shares on constructive trust for the plaintiff. Hence, the plaintiff clearly had a claim in equity against the defendant in respect of the dividends received by the defendant for the benefit of the plaintiff. (para 18)

(2) The doctrine of unjust enrichment applied to the facts in the instant appeal, more specifically when the defendant had never paid the purchase price for the shares, in which case, the defendant was not entitled to retain the dividends declared for the shares. The plaintiff had proved that the defendant had been unjustly enriched at the plaintiff's expense. The plaintiff

had the right to recover the dividends from the defendant by way of restitution as it was unjust for the defendant to keep them. The defendant's appeal herein was wholly without merits. (para 25)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif, melalui persetujuan bertarikh 19 Ogos 1996 ('perjanjian utama'), bersetuju untuk menjual saham-saham kepada defendan, harga pembelian sepenuhnya adalah RM409,568,312.80 ('harga pembelian'). Di bawah perjanjian utama, defendan memberi plaintif gerenti bank yang tidak boleh dipatahkan untuk harga pembelian. Defendan diperlukan membayar harga pembelian kepada plaintif pada atau sebelum 16 Oktober 1997. Defendan gagal untuk berbuat demikian. Pihak-pihak terlibat kemudiannya memasuki dua lagi perjanjian tambahan membenarkan lanjutan masa kepada defendan untuk membayar harga pembelian tetapi defendan masih gagal berbuat demikian. Pada 22 Oktober 2001, pihak-pihak terlibat memasuki Perjanjian Penyelesaian di mana, antara lain (i) jualan dan pembelian saham-saham dibatalkan; (ii) defendan memindah milik kembalikan saham-saham tersebut kepada plaintif dan (iii) wang berjumlah lebih dari RM20 juta di dalam Akaun Dana Jaminan (yang dibuka dengan nama-nama bersama defendan dan plaintif bagi tujuan menggunakan wang di dalam akaun itu untuk pembayaran harga belian dan faedah) diberi kepada plaintif. Semasa tempoh lima tahun dari 16 Oktober 1996 ke 22 Oktober 2001, saham-saham yang telah didaftarkan dalam nama defendan, dan syarikat yang dikawal dan diurus oleh wakil-wakil defendan. Defendan juga telah menerima jaring cukai dan dividen-dividen yang dideklarasikan bagi saham-saham. Di dalam Mahkamah Tinggi, hakim telah membenarkan saman pemula plaintif dan mendeklarasikan bahawa 199,301,606 saham-saham ('saham-saham') di dalam Pernas International Holdings Berhad ('saham-saham') yang didaftarkan dalam nama defendan dan dividen-dividen berjumlah RM100,527,735.12 ('dividen-dividen') yang diterima oleh defendan dipegang oleh defendan sebagai pemegang amanah konstruktif bagi plaintif, untuk dibayar kepada plaintif ('keputusan Mahkamah Tinggi'). Defendan membuat rayuan. Isu-isu yang timbul adalah (i) sama ada defendan memegang saham-saham atas amanah konstruktif bagi plaintif supaya plaintif mempunyai tuntutan ekuiti terhadap defendan berhubungan dividen-dividen yang

diterima defendan dan (ii) sama ada pengekalan dividen-dividen oleh defendan-defendan, sebagai pembeli saham-saham, tanpa membuat bayaran harga pembelian, membawa kepada pengkayaan tidak wajar.

Diputuskan (menolak rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Amanah konstruktif berbangkit menerusi operasi undang-undang. Ia dikenakan oleh ekuiti melalui alasan keadilan dan suara hati baik. Ia telah digambarkan sebagai "satu contoh baru amanah konstruktif" : oleh Lord Denning MR di *Eves v. Eves*. Prinsip ini digunapakai di dalam *Sanmaru Overseas Marketing Sdn Bhd & Anor v. PT Indofood Interna Corp & Ors*. Menerusi alasan prinsip ekuiti yang ditemui di dalam *Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd Soo Yuh Mian (Intervener)* dan *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, dan mengikut keadilan dan suara hati baik, tidak terdapat keraguan bahawa defendan di dalam kes ini memegang saham-saham atas amanah konstruktif untuk plaintif. Oleh itu, plaintif dengan jelasnya mempunyai tuntutan dalam ekuiti terhadap defendan mengenai dividen-dividen yang diterima oleh defendan untuk kepentingan plaintif.

(2) Doktrin pengkayaan tidak wajar digunapakai pada fakta-fakta dalam rayuan ini, lebih khususnya apabila defendan tidak pernah membayar harga pembelian bagi saham-saham, oleh itu, defendan tidak mempunyai hak untuk mengekalkan dividen-dividen yang dideklarasikan bagi saham-saham itu. Plaintif telah membuktikan bahawa defendan telah diperkayakan secara tidak wajar atas perbelanjaan plaintif. Plaintif mempunyai hak untuk mendapat balik dividen-dividen dari defendan menerusi restitusi kerana ia tidak adil untuk defendan-defendan menyimpannya. Rayuan defendan di sini adalah tanpa merit.

Case(s) referred to:
Eves v. Eves [1975] 3 All ER 768 ***(refd)***
Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd; Soo Yuh Mian (Intervener) [2011] 3 CLJ 16 CA ***(refd)***
Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122 ***(refd)***
Klienwort Benson Ltd v. Birmingham City Council [1996] 4 All ER 733 CA ***(refd)***
Lipkin Gorman (a firm) v. Karpnale Ltd [1992] 4 All ER 512 ***(refd)***
Moses v. Macferlan [1760] 2 Burr 1005 ***(refd)***

A *Parway Estates Ltd v. Commissioners of Inland Revenue [1958] 45 TC 135* ***(refd)***
Re Estate of Choong Lye Hin, Deceased; Choong Gim Guan v. Choong Gim Seong [1976] 1 LNS 130 FC ***(refd)***
Sanmaru Overseas Marketing Sdn Bhd & Anor v. PT Indofood Interna Corp & Ors [2009] 3 CLJ 10 CA ***(refd)***
B *Sinclair v. Brougham [1914] AC 398* ***(refd)***
Woolwich Building Society v. IRC (No 2) [1992] 3 All ER 737 ***(refd)***

Other source(s) referred to:
Goff and Jones, The Law of Restitution, 4th edn, 1993, pp 12-13

C *For the appellant - Porres Royan (Low Weng Tchung with him); M/s Shook Lin & Bok*
For the respondent - Robert Lazar (TT Toi with him); M/s Shearn Delamore & Co

D *[Appeal from High Court, Kuala Lumpur; Originating Summons No: D2-24-3-2003]*

Reported by Suhainah Wahiduddin

E

JUDGMENT

Low Hop Bing JCA:

Appeal

F **[1]** On 22 November 2007, the Kuala Lumpur High Court allowed the respondent's (the plaintiff's) originating summons and declared that the 199,301,616 shares in PIHB ie, Pernas International Holdings Berhad ("the shares") registered in the name of the appellant ("the defendant") and the dividends amounting to RM100,527,735.12 ("the dividends") received by the defendant were held by the defendant as constructive trustee for the plaintiff, to be paid to the plaintiff, in addition to costs (collectively, "the High Court decision").

H **[2]** On 23 August 2010, we dismissed the defendant's appeal against the High Court decision. We now give our grounds.

Factual Background

I **[3]** By an agreement dated 19 August 1996 ("the principal agreement") the plaintiff agreed to sell the shares to the defendant at RM2.05 per share, the full purchase price being RM409,568,312.80 ("the purchase price").

[4] Pursuant to the principal agreement, the defendant provided the plaintiff with an irrevocable bank guarantee for the purchase price. The defendant was required to pay the purchase price to the plaintiff on or before 16 October 1997. The defendant failed to do so.

[5] On 14 October 1997, the parties entered into a supplemental agreement ("the 1st supplemental agreement") whereby the plaintiff granted the defendant an extension of one year to pay the purchase price on or before 16 October 1998. However, the defendant did not comply.

[6] Under the 2nd supplemental agreement dated 29 July 1999:

(a) the plaintiff granted the defendant yet another extension of one year, to make payment on or before 16 October 1999;

(b) the defendant made interest payments of RM19,882,815.31 to the plaintiff by reason of the defendant's failure to pay the purchase price; and

(c) parties agreed to open a sinking fund account in a bank or financial institution approved by the plaintiff, in the joint names of the defendant and the plaintiff; and the purpose of the "sinking fund" was to utilise the monies in that account towards the payment of the purchase price and interest.

[7] Notwithstanding the second extension, the defendant did not honour its commitment towards payment of the purchase price.

[8] On 22 October 2001, the parties entered into a settlement agreement whereby:

(a) the sale and purchase of the shares was terminated;

(b) the defendant re-transferred the shares to the plaintiff;

(c) the monies amounting to more than RM20 million in the sinking fund account were released to the plaintiff; and

(d) all but one of the directors nominated by the defendant agreed to resign from the board of directors.

[9] During the period of some five years from 16 October 1996 to 22 October 2001, the shares were registered in the defendant's name, and the company (PIHB) was controlled and managed by the defendant's representatives.

[10] From 8 November 1996 to 16 January 2001, the defendant received, net of tax, the dividends declared for the shares.

Legal And Beneficial Ownership In The Shares

[11] Learned counsel Mr Porres Royan (assisted by Mr Low Weng Tchung) contended *inter alia* that upon the execution of the principal agreement, the legal and beneficial ownership of the shares became vested in the defendant and the plaintiff has no claim in equity relating to the dividends, as no constructive trust could arise therefrom.

[12] In response, Mr Robert Lazar (Mr TT Toi with him) argued that during the five years when the shares were registered in the defendant's name and the defendant did not pay the purchase price to the plaintiff, the defendant was actually holding the shares on constructive trust for plaintiff as the beneficial owner thereof.

[13] On the basis of the above submissions, we must address the following question:

> Given the above factual background, was the defendant holding the shares on constructive trust for the plaintiff so that the plaintiff has a claim in equity against the defendant in respect of the dividends received by the defendant?

[14] In this regard, the defendant relied heavily on *Parway Estates Ltd v. Commissioners of Inland Revenue* [1958] 45 TC 135 CA where the (English) Court of Appeal upheld the judgment of Upjohn J who had affirmed the decision of the commissioners of inland revenue that in relation to the two conveyances or transfers dated 28 February 1956, *ad valorem* stamp duty was payable. The Court of Appeal also held that the equitable and beneficial interest in the shares became vested in the purchaser when the sale and purchase agreement was signed.

[15] We find that in *Parway Estates Ltd*, *supra*, the distinguishable fact which is of critical importance is that the transfers were executed in consideration of the payment of the sum due under the agreement. In effect, that authority militates against the defendant herein. The defendant had never paid the purchase price to the plaintiff to support the transfer of the shares. Clearly, no equitable and beneficial interest in the shares can ever become vested in the defendant. If at all, only the legal ownership was vested in the defendant, and the defendant was holding the shares on constructive trust for the plaintiff. The defendant, being the

plaintiff's constructive trustee, was in no position whatsoever to beneficially claim the dividends declared for the shares. In equity, the defendant was accountable to the plaintiff for the dividends.

[16] A constructive trust arises by operation of law. It is imposed by equity by reason of justice and good conscience. It has been described as "a constructive trust of a new model": per Lord Denning MR in *Eves v. Eves* [1975] 3 All ER 768, 771. This principle was applied by this court in *Sanmaru Overseas Marketing Sdn Bhd & Anor v. PT Indofood Interna Corp & Ors* [2009] 3 CLJ 10; [2009] 2 MLJ 765, 832 and 833, [163] to [166], where Abdul Malik Ishak JCA has very succinctly set out the characteristics of a constructive trust and the authorities showing the imposition of constructive trusts.

[17] More recently, in *Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd; Soo Yuh Mian (Intervener)* [2011] 3 CLJ 16 CA, this court was invited to consider the principles governing constructive trustee. There, the plaintiff and the defendant entered into a joint venture agreement (the JVA) to develop the plaintiff's land into 12 lots of four storey shop-offices, out of which the plaintiff was entitled to four lots and the defendant, the remaining eight lots. The JVA was executed by the former directors of the plaintiff pursuant to a resolution. An irrevocable power of attorney ("the IPA") was prepared pursuant to cl. 5(xv) of the JVA. The IPA was executed by the authorized directors according to their resolution, attested by the plaintiff's own solicitors and forwarded to the defendant's solicitors. On the completion date, the plaintiff took possession of its lots and subsequently declared that the JVA has been terminated. The defendant challenged the purported termination. The plaintiff then filed an originating summons ("OS") seeking, *inter alia*, to declare the JVA and the IPA null and void. Before the trial court could deliver the judgment, the plaintiff had purportedly sold the defendant's lots to a third party, the intervener. The plaintiff's OS was dismissed by the High Court. The plaintiff's appeal was also dismissed by this court. On the issue of the plaintiff's position as constructive trustee, I spoke for this court at pp. 27 and 28, [21] to [23], as follows:

> [21] Upon completion of the joint venture project on January 2, 2009, the plaintiff became a constructive trustee in equity for the defendant in respect of the defendant's lots to which the defendant was entitled under the JVA. The defendant was the equitable or beneficial owner of the defendant's lots.

A [22] The said constructive trust arises by operation of law, eg, from the plaintiff's unconscionable conduct or abuse of fiduciary relationship between the plaintiff as trustee (or legal owner) and the defendant as *cestui que* trust (or beneficiary). The constructive trust enables the defendant as beneficiary to
B enforce the trustee's ("plaintiff's") conscience in relation to the trustee's ("the plaintiff's") treatment of the beneficiary's ("defendant's") lots, or the abuse of fiduciary duties which the trustee ("the plaintiff") owes to the beneficiary ("the defendant").

C [23] In *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669 HL, Lord Browne-Wilkinson propounded, *inter alia*, the following principles:

(1) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of
D the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust); and

E (2) Once a trust is established, as from the date of its establishment, the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or
F substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

[18] By reason of the above principles of equity and in accordance with justice and good conscience, there can be no
G doubt that the defendant in the instant appeal was holding the shares on constructive trust for the plaintiff. Hence, the plaintiff certainly has a claim in equity against the defendant in respect of the dividends received by the defendant for the benefit of the plaintiff. Our answer to the above question is in the affirmative.

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Unjust Enrichment

[19] The defendant maintained that although the defendant has not paid the purchase price for the shares, the defendant
I nevertheless has the right to retain the dividends and such retention would not amount to unjust enrichment.

[20] The plaintiff took the position that the defendant would be unjustly enriched and so the defendant should not be allowed to retain the dividends. A

[21] These opposing submissions call for the determination of the following question: B

> Would the retention of the dividends by the defendant, as purchaser of the shares, without paying the purchase price therefor, amount to unjust enrichment?

[22] The concept of unjust enrichment received judicial illumination in *Re Estate of Choong Lye Hin, Deceased; Choong Gim Guan v. Choong Gim Seong* [1976] 1 LNS 130 FC. The appellant there claimed (a) the balance of his share in the estate of his deceased father; and (b) the balance of the sum kept in a trust account by his father in an account under the name of "Gim Kee". The respondent claimed a right to set-off and counterclaim, based on estate duty paid out of the estate in respect of *inter vivos* gifts to the appellant and by the third defendant in respect of the share of the appellant in moneys in the "Gim Kee" account. The learned trial judge, Chang Min Tat J (later FJ), gave judgment in favour of the respondent on the set-off and counterclaim. The appellant appealed. The Federal Court held *inter alia* that the circumstances of the case render it inequitable that the appellant should be allowed to retain the benefit of the payment. Lee Hun Hoe CJ (Borneo) (as he then was) in delivering the judgment of the Federal Court affirmed the statement of the learned trial judge that "where it is inequitable for the party who received the money or the benefit of any payment to retain it, he should be made to repay or account for the benefit." The learned CJ (Borneo) referred to *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122 at 135-136; [1943] AC 32 at 64 HL where Lord Wright, dealing with an appeal concerning a claim for the repayment of money made on account of the price under a contract which had been frustrated, alluded to the common law action "for money had and received as a practical and useful, if not complete or ideally perfect, instrument, to prevent unjust enrichment, aided by the various methods of technical equity which are also available, as they were found to be in *Sinclair v. Brougham* [1914] AC 398, 456." C D E F G H I

[23] In *Fibrosa*, *supra*, Lord Wright continued as follows:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution. The root idea was stated by three Lords of Appeal, Lord Shaw, Lord Sumner and Lord Carson, in *Jones v. Waring and Gillow* [1926] AC 670, [1926] All ER Rep 36, which dealt with a particular species of the category, namely, money paid under a mistake of fact. *Lord Sumner* [1926] AC 670 at 696, [1926] All ER Rep 36 at 47) referring to *Kelly v. Solari* [1841] 9 M & W 54; [1835-42] All ER Rep 320), where money had been paid by an insurance company under the mistaken impression that it was due to an executrix under a policy which had in fact been cancelled, said: "There was no real intention on the company's part to enrich her." Payment under a mistake of fact is only one head of this category of the law. Another class is where, as in this case, there is prepayment on account of money to be paid as consideration for the performance of a contract which in the event becomes abortive and is not performed, so that the money never becomes due. There was in such circumstances no intention to enrich the payee.'

[24] Further judicial gloss in relation to this remedy in quasi-contract or restitution arising from unjust enrichment is to be found in *Klienwort Benson Ltd v. Birmingham City Council* [1996] 4 All ER 733 CA. There, the defendant local authority entered into an interest rate swap contract with the plaintiff bank. Such a contract was subsequently ruled by the House of Lords to be ultra vires local authorities and void. The bank then brought an action against the local authority claiming restitution of £353,321.91, being the net amount it had paid to the local authority under the contract, on the basis of unjust enrichment. The High Court judge entered final judgment for the bank. The local authority's appeal was dismissed by the Court of Appeal which held, *inter alia*, that to establish a claim in restitution, a plaintiff had to show that the defendant had been unjustly enriched at the plaintiff's expense. That issue had to be determined by reference to the payer/payee relationship alone; the payee's obligation, which was correlative to the payer's right to

restitution, was to repay the amount he had received which it was unjust that he should keep. At pp. 736 and 737, Evans LJ stated the law with unrivalled clarity. We would gratefully distil the relevant fundamental principles as follows: A

(a) The principle of unjust enrichment requires the recipient of money to repay it when the circumstances are such that it is contrary to 'the ties of natural justice and equity' for him to retain it (see Lord Mansfield CJ's celebrated dictum in *Moses v. Macferlan* [1760] 2 Burr 1005 at 1012, [1558-1774] All ER Rep 581 at 585). B C

(b) A person who has been unjustly enriched at the expense of another is required to make restitution to the other: see *American Law Institute's "Restatement of the Law, Restitution"* (1937) Chapter 1; and *Goff and Jones "The Law of Restitution"* (4th edn, 1993) pp 12-13). This principle has been authoritatively recognized in two judgments of the House of Lords: *Lipkin Gorman (a firm) v. Karpnale Ltd* [1992] 4 All ER 512, [1991] 2 AC 548 and *Woolwich Building Society v. IRC* (No 2) [1992] 3 All ER 737, [1993] AC 70. D E

(c) The plaintiff is entitled to recover not damages, but a quantified sum from a defendant who was not necessarily a wrongdoer and who was not bound by any contract or express undertaking to pay the sum claimed by the plaintiff. The circumstances in which such a non-contractual obligation can arise are various; the recovery of money paid under a mistake of fact (though not, historically and so far as English law is concerned, under a mistake of law), or where the consideration in return for which the money was paid has failed, are well established examples. F G

(d) It is recognised that these different forms spring from a single underlying principle, which is described as the right to recover on grounds of unjust enrichment; that is to say, the defendant has been unjustly enriched by the payment made to him and which the plaintiff seeks to recover. H

(e) Notwithstanding its roots in natural justice and equity, the principle does not give the courts a discretionary power to order repayment whenever it seems in the circumstance of the particular case just and equitable to do so. The recovery of I

money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and, even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle: See *Lipkin Gorman* [1992] 4 All ER 512 at 532, [1991] 2 AC 548 at 578 per Lord Goff.

[25] The doctrine of unjust enrichment applies to the facts in the instant appeal, more specifically when the defendant has never paid the purchase price for the shares, in which case, the defendant is not entitled to retain the dividends declared for the shares. The plaintiff has proved that the defendant has been unjustly enriched at the plaintiff's expense. The plaintiff has the right to recover the dividends from the defendant by way of restitution as it is unjust for the defendant to keep them. We therefore answer the above question in the affirmative.

Conclusion

[26] The defendant's appeal being wholly without merits was dismissed with costs. After hearing submissions, we awarded costs of RM40,000 to the plaintiff. The decision of the High Court was affirmed. Deposit to be paid to the plaintiff (respondent) on account of the fixed costs.